IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-753

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA, *Petitioner,*

v.

JOHN DANIEL, *Respondent.*

No. 77-754

LOCAL 705, INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA, AND
LOUIS F. PEICK, *Petitioners,*

v.

JOHN DANIEL, *Respondent.*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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MOTION OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITIONS FOR A WRIT OF CERTIORARI

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MOTION OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 42(3) of the Rules of this Court, the National Coordinating Committee for Multiemployer Plans ("NCCMP") respectfully moves for leave to file the accompanying brief as *amicus curiae*. Petitioners have consented to the filing of this brief; respondent has not.

INTEREST OF THE NCCMP

Multiemployer plans were formed in construction and other transient trades or industries where workers are employed too briefly in any one job to earn benefits in any given employer's plan. Such plans are created and funded by collective bargaining agreements and receive contributions from more than one employer. The NCCMP is a nonprofit, tax-exempt organization, formed after enactment of the Employee Retirement Income Security Act of 1974 ("ERISA") to participate in the development of government regulations under ERISA and other laws affecting multiemployer plans. Fifty trade unions and multiemployer pension and welfare funds (but not the particular pension and welfare funds involved in this case) are affiliated with the NCCMP, and its plans are fairly representative of all the nation's multiemployer plans, covering in the aggregate 7.5 million employees. While the decision below has far-reaching consequences for pension plans generally, the consequences are particularly adverse for multiemployer plans, for the reasons set forth in the accompanying brief.

The accompanying brief supports the petitions for writ of certiorari, but the NCCMP in no way ap-

proves of arbitrary, harsh and restrictive continuity of service provisions. Such provisions are not common in other multiemployer plans. Nonetheless, the holding below that an employee covered by an involuntary, noncontributory pension plan "purchases securities" by commencing and continuing employment has far-reaching consequences, for it makes every pension plan subject to the requirements of the securities laws. This result obtains whatever the outcome in the district court after a trial on the merits of Mr. Daniel's claims.

FACTS AND QUESTIONS OF LAW DEVELOPED BY THE NCCMP

The NCCMP's brief does not address the issue whether participants in noncontributory, involuntary pension plans are "purchasers of securities" within the meaning of the securities acts. The NCCMP instead focuses on important points which it believes have not been adequately presented elsewhere: (a) the particular and immediate impact of the lower court's decision on collectively-bargained multiemployer plans; and (b) the essentially legislative function which courts perform in extending private rights of action under Section 10(b) of the Securities Exchange Act and SEC Rule 10b-5, and the consideration courts must therefore give to the public policy issues at stake. The accompanying brief addresses what the NCCMP conceives to be the vital considerations of public policy which the lower court should have taken into account before conferring such private rights of action upon the new class of claimants created by its decision.

The NCCMP therefore moves for leave to file the accompanying brief as *amicus curiae.*

Respectfully submitted,

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BRIEF OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS AS AMICUS CURIAE IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

The National Coordinating Committee for Multiemployer Plans ("NCCMP") submits this brief as *amicus curiae* to urge this Court to review the holding below[1] that the relationship between a worker and a noncontributory, involuntary pension plan is one of purchaser and seller of securities, thereby subjecting all such pension plans to the federal securities laws.

I. INTEREST OF NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

The nature and purpose of the NCCMP is set forth in the accompanying motion for leave to file this brief. As set forth *infra* (pp. 17-19), the NCCMP believes that the lower court's decision may have particularly significant effects upon multiemployer plans. It is concerned over damage awards resulting from the lower court's ruling, which would, in effect, retroactively expand the number of workers eligible for pension benefits. It is also concerned over the administrative and litigation costs and damage awards that will be incurred if securities laws requirements are added to existing requirements administered by the Departments of Labor and the Treasury.[2] All these costs will ultimately be borne by those now covered by multiemployer plans and will be reflected in smaller pension

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[1] *Daniel* v. *International Brotherhood of Teamsters*, 561 F.2d 1223 (7th Cir. 1977).

[2] The dual administration of ERISA (by the Departments of Labor and the Treasury) has already been a source of conflict and confusion, resulting, *inter alia*, in legislative proposals to divide jurisdiction into discrete areas, or to put all administrative responsibility into a single government agency. *See, e.g.*, S. 901, 95th Cong., 1st Sess. (1977); H.R. 4340, 95th Cong., 1st Sess. (1977), *summarized*, Pens. Plan Guide (CCH) ¶ 23,268 (1977). Treble administration (including the Securities and Exchange Commission) can only exacerbate an already difficult situation.

payments to them, or even in curtailment of pension plan coverage.

II. REASONS FOR GRANTING THE WRIT

The lower court has tried to correct what it perceived to be an egregious wrong committed against Mr. Daniel.[3] The court did not reach the claims he asserted under common law and federal labor law, but ruled that all workers covered by involuntary, noncontributory pension plans are "purchasers of securities," and are, therefore, entitled to sue the funds under Rule 10b-5. The court has thus exposed all collectively-bargained pension funds to damage suits for breach of their duty of disclosure under the securities acts—a duty no one ever supposed they had.[4] The court's decision confirms the ancient wisdom that "hard cases make bad law." *Northern Securities Co.* v. *United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

A. The Decision Below Should be Reviewed Because Its Adverse Effects Are Immediate

The decision below has already generated uncertainties on the part of plan administrators and contributing employers. These uncertainties will adversely affect participants and beneficiaries and will persist so long as the lower court's holding on the application of the securities acts stands.

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[3] The restrictive continuity of service requirements applied to Mr. Daniel are not commonly found in other multiemployer plans.

[4] In *Robinson* v. *United Mine Workers Health & Retirement Funds*, 435 F. Supp. 245, 247 (D.D.C. 1977), Judge Gesell said:

> "The securities laws in question, designed to safeguard the integrity of investment decisions have been in operation for over forty years. Yet until the 1975 decision in *Daniel* (which pre-

The lower court held (561 F.2d at 1229) that pension funds must, "when offering a defined pension plan to a [union] member . . . disclose the actuarial probability . . . that a member actually will receive pension benefits." Such disclosure would be an essentially hopeless task and the NCCMP knows of no pension plan which has ever attempted it.

The likelihood that a given employee will receive pension benefits not only turns on such factors as the vitality of the industry (especially in multiemployer plans) and the health of the individual employer, but also depends in large measure upon whether that employee chooses to remain employed in the industry or go elsewhere. Thus, while actuarial assumptions concerning "turnover" of employees may be useful in calculating the future liabilities of a pension plan and the contribution rate necessary to fund such liabilities, individual "turnover" is subject to a number of factors, some of which are solely within the knowledge and control of the individual plan participant. Aggregate actuarial data will thus be misleading rather than informative with respect to the probability that an individual plan participant will remain in the plan long enough to qualify for a benefit.[5] Under the lower court's decision, however, a person who failed to meet the eligibility requirements of virtually any pension plan in the country could demonstrate a failure to disclose this "actuarial probability." and seek relief under Rule 10b-5.[6]

dated *Forman*) no court had ever held, nor apparently had anyone including the SEC the temerity to argue that an interest in an involuntary, noncontributory pension or health benefit plan was covered by the securities laws." (Footnote omitted).

[5] *See* F. Cummings, *The Daniel Case—Disclosure or mandatory oddmaking,* Pension World, November 1977, at 37. Mr. Cummings describes the party making the disclosure required by the Seventh Circuit as "a new kind of oddsmaker—a 'vesting bookie'. . . ." *Id.*

Furthermore, the lower court's decision will not be limited to failures to disclose the actuarial probability of receiving a benefit. Any alleged failure to disclose or any misstatement concerning eligibility requirements, size and timing of benefits, investment policies or any other matter that bears on the value of the

[6] The SEC suggested in its *amicus* brief to the court below (pp. 5, 58) that pension funds will be affected by the decision below only if they engaged in actual fraud. It is true that *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185 (1976), established that a defendant did not violate Rule 10b-5 unless he acted with "scienter," a "mental state embracing intent to deceive, manipulate, or defraud," *id.* at 193 n. 12. In its pretrial brief in *SEC* v. *National Student Marketing Corp.,* Civ. Action No. 225-72 (D.D.C.), dated December 6, 1976, however, the SEC contended that even in private damage cases, under *Hockfelder,* " 'scienter' may be proven without evidence of specific intent to deceive but by evidence of 'gross negligence' or other knowing conduct." SEC Brief at 165. Citing *Herzfeld* v. *Laventhol, Krekstein, Horwath & Horwath,* 540 F.2d 27 (2d Cir. 1976); *Bailey* v. *Meister Brau, Inc.,* 535 F.2d 982 (7th Cir. 1976); and *McLean* v. *Alexander,* 420 F.Supp. 1057 (D. Del. 1976), the SEC contended that this modified negligence standard has been the lower courts' response to the *Hochfelder* definition of the culpability necessary to establish a violation of Rule 10b-5. SEC Brief at 165. *See also, e.g., Franke* v. *Midwestern Oklahoma Development Authority,* 428 F. Supp. 719, 725 (D. Okla. 1976). Furthermore, the SEC contends that it need not prove scienter at all in injunctive actions, SEC Brief at 164-65. Yet an injunction might include rescissionary and collateral relief in the nature of money damages, *see, e.g., SEC* v. *Texas Gulf Sulphur Co.,* 446 F.2d 1301 (2d Cir.), *cert. denied,* 404 U.S. 1005 (1971).

Moreover, the language of the lower court's holding suggests that inquiry into "scienter" is unnecessary and liability follows simply from the failure "to disclose adequate information . . . including a statistically determinable risk that many employees covered by a plan will never receive their pension benefits." 561 F.2d at 1249 (footnote omitted).

worker's "investment" will, under the court's decision, provide grist for the Rule 10b-5 class action mill.[7]

In these circumstances, administrators and employers are understandably concerned over their funds' potential liability[8] under the ruling of the lower court. Indeed, the NCCMP has been advised that some employers and plan administrators, concerned over the implications of the decision below, have already declined to approve new benefits or increases in existing benefits.[9] Furthermore, concerns about potential liability and additional costs and regulation brought about by the applicability of the securities laws[10] are likely to result in a significant curtailment in the provision

[7] In *SEC* v. *Shenker*, Civ. Action No. 77-1787 (D.D.C. 1977), the SEC significantly expanded its view of the application of the antifraud provisions to employee benefit plans, by moving from the concept of disclosure about terms and conditions of participation in a plan to the investment policies and fiduciary conduct of plan officials—welfare plan officials as well as those of a pension plan.

[8] Whether the aggregate liability of all plans would prove to be as enormous as many fear, plan administrators and employers must take all possibilities into account.

[9] In one case currently being litigated, a contributing employer contends that the plan's alleged failure to make the disclosures required by the decision below vitiates his obligations under the collective bargaining agreement and entitles him to a refund of all contributions previously made. *Western Washington Laborers-Employers Health & Security Trust Fund* v. *Universal Utility Contractors, Inc.*, Civ. No. C77-710M (W. D. Wash.).

[10] While this brief is principally addressed to the costs and burdens associated with the antifraud provisions of the securities acts, it is by no means clear that the registration requirements of those laws would not also be applicable. As the petitions of the Teamsters International (pp. 14-16) and of Local 705 (pp. 22-31) point out, the lower court's reasoning as to the alleged inapplicability of the registration provisions is unpersuasive. The court relied largely on a 1970 amendment to the Securities Act of 1933 which exempted from registration any interest in a "trust fund maintained by a bank or in a separate account maintained by an insurance company," where such interest is issued in connection with a stock bonus, pension or profit sharing plan. Even if this provision does exempt other pension plans from registration (which we doubt), it has little relevance to multiemployer plans because the assets of such plans are frequently not managed by banks or by insurance companies.

of pension benefits,[11] which it must be noted, neither ERISA nor any other federal law requires employers to provide.

B. The Lower Court's Decision Is Inconsistent With This Court's Holdings Limiting Private Rights Of Action Under Rule 10b-5

The NCCMP does not here address the principal issue dealt with by the certiorari petitions, *i.e.,* the lower court's holding that an interest in an involuntary, noncontributory pension plan is a "security" and that employment of union members covered by such a plan constitutes the "sale" of this security. We believe, for the reasons set forth in the petitions and supporting *amici* briefs, that such a holding cannot be squared with this Court's decision in *United Housing Foundation, Inc.* v. *Forman,* 421 U.S. 837 (1975).

[11] According to a Pension Benefit Guaranty Corporation ("PBGC") study, "Analysis of Single Employer Defined Benefit Plan Terminations, 1976," PBGC Publication No. 505, approximately ten percent of the plans covered by Title IV of ERISA (relating to plan termination insurance and contingent employer liability) terminated in the two calendar years following its enactment. *Id.* at 2. Of those plans terminating in 1976, 20 percent cited ERISA as the reason for termination, and another 15 percent cited ERISA as one of several reasons. *Id.* at 2. The House Small Business Committee recently surveyed the plans that notified the PBGC between June, 1976 and April, 1977 of an intent to terminate. Of those responding, 87.3 percent indicated that ERISA had some effect on the decision. *See* Pension Rep. (BNA) R-11 et seq. (Oct. 24, 1977).

Even accepting, however, the lower court's conclusion that an employee makes an "investment decision" simply by taking a job, it does not follow that this newly-ordained "purchaser of a security" may sue under Rule 10b-5.

The private right of action under Rule 10b-5 is a creature of the judiciary, not of Congress.[12] This Court said in *Santa Fe Industries, Inc.* v. *Green,* 430 U.S. 462, 477 (1977):

> "Congress did not expressly provide a private cause of action for violations of § 10(b). Although we have recognized an implied cause of action under that section in some circumstances, *Superintendent of Insurance* v. *Bankers Life & Cas. Co.,* [404 U.S.] at 13 n. 9, we have also recognized that a private cause of action under the antifraud provisions of the Securities Exchange Act should not be implied where it is 'unnecessary to ensure the fulfillment of Congress' purposes' in adopting the Act. *Piper* v. *Chris-Craft Industries, Inc.,* [430 U.S.] at 41. *Cf. J.I. Case Co.* v. *Borak,* 377 U.S. 426, 431-433 (1964)."

Extension of the private right of action under Rule 10b-5 to new classes of claimants therefore turns on (i) whether such extension is necessary to fulfill Congress' purposes in passing the securities acts; and (ii) a judicial balancing of the "policy considerations" involved, *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723, 737, 749 (1975).

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[12] As this Court has recently made clear, federal courts should not automatically imply private rights of action under statutes that specify violations but provide no express private remedies. *Cort* v. *Ash,* 422 U.S. 66 (1975).

1. A worker's taking a job with an employer covered by a collectively-bargained pension fund is not an event that reasonably relates to the aims of the securities acts

As the language of Section 10(b) of the 1934 Act and Rule 10b-5 suggest,[13] those provisions were designed to prevent manipulation of prices on the securities markets and fraudulent devices to enrich promoters at the expense of investors. There are no markets for the pension fund "securities" here involved, and neither the motives of the "sellers" (be they funds, employers, or unions) nor the circumstances under which the "sales" take place (*i.e.,* the hiring of workers) bear the slightest resemblance to those involved in the market-rigging, promotional schemes at which Section 10(b) and Rule 10b-5 were aimed. *Santa*

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[13] Section 10(b) provides:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

"(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rates and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Rule 10b-5 provides:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

Fe Industries, Inc. v. *Green, supra,* 430 U.S. at 476; *United Housing Foundation, Inc.* v. *Forman, supra,* 421 U.S. at 849. Thus, it can hardly be said that granting rights to sue under Rule 10b-5 to workers covered by involuntary, noncontributory pension plans is necessary to fulfillment of Congress' purpose in passing the securities acts. *Piper* v. *Chris-Craft Industries, Inc.,* 430 U.S. 1, 41 (1977).

2. On public policy grounds, private rights of action under Rule 10b-5 should not be permitted against involuntary, noncontributory collectively-bargained pension funds

The policy considerations involved in this case, some of which are identical with those on which this Court relied in *Blue Chip Stamps, supra,* for refusing to extend private rights of action under Rule 10b-5 to offerees of securities, compel a like conclusion here.

a. Extension of such private rights would lead to vexatious litigation

The Court noted in *Blue Chip* that Rule 10b-5 litigation presents a significant "danger of vexatiousness different in degree and in kind than that which accompanies litigation in general" and noted "the possibility 'that unduly expansive imposition of civil liability will lead to large judgments payable in the last analysis by innocent investors for the benefit of speculators and their lawyers,'" 421 U.S. at 739, quoting Judge Friendly's concurring opinion in *SEC* v. *Texas Gulf Surphur Co.,* 401 F.2d 833, 867 (2d Cir. 1968), *cert. denied,* 394 U.S. 976 (1969), 404 U.S. 1005 (1971).

Here, there is no less a likelihood that large lawsuits will be inspired by the lower court's holding that Rule 10b-5 may be invoked against collectively bargained

pension funds. Millions of workers have suddenly been transformed into holders of "securities" in those funds, some of whom, like Daniel, "purchased" those "securities" over 20 years ago. The circumstances under which these "securities" were "sold" to persons who may now lay claim to disappointed pension expectations will make such persons and the plans in which they participated fair game for class action specialists. It is the plan participants and beneficiaries, however, who must ultimately bear the costs of that litigation, since pension trusts exist solely for their benefit.

This Court also noted in *Blue Chip* that extending the private right of action under Rule 10b-5 to defrauded offerees of securities would confront courts and juries with "many rather hazy issues of historical fact, the proof of which [would] depend almost entirely on oral testimony." 421 U.S. at 743. The nature of this proof, the court indicated, might subject defendants to a kind of legalized blackmail, forcing settlements even in groundless cases. Such dangers are equally apparent here. Retroactive application of a "failure to disclose" rule (back to 1955 in Daniel's case[14]) necessarily involves "hazy issues of historical fact," the resolution of which depends on oral testimony as to what the worker was told when first employed. Indeed, the lower court's conclusion that a "sale" was involved relies, in part, on Daniel's affidavit

> "that he would not have worked for a Local 705 covered employer if he had been advised about the continuous nature of the 20-year requirement before receiving a pension." 561 F.2d at 1243.

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[14] *See* 561 F.2d at 1227.

The court also found that,

> "[w]hen an employee decides to retain his job his decision results in his continuing to give value in the future in his further acquisition of interests in the pension fund." *Id.*

Proof that these actions involved "investment decisions" will almost always depend on the claimant's oral testimony concerning his state of mind years ago. As this Court said with respect to similar "state of mind" proof in *Blue Chip:*

> "Plaintiff's proof would not be that he purchased or sold stock, a fact which would be capable of documentary verification in most situations, but instead that he decided *not* to purchase or sell stock. Plaintiff's entire testimony could be dependent upon uncorroborated oral evidence of many of the crucial elements of his claim, and still be sufficient to go to the jury. The jury would not even have the benefit of weighing the plaintiff's version against the defendant's version, since the elements to which the plaintiff would testify would be in many cases totally unknown and unknowable to the defendant. The very real risk in permitting those in respondent's position to sue under Rule 10b-5 is that the door will be open to recovery of substantial damages on the part of one who offers only his own testimony to prove that he ever consulted a prospectus of the issuer, that he paid any attention to it, or that the representations contained in it damaged him." 421 U.S. at 746 (footnote omitted).

b. Extension of such private rights of action would destroy the balance Congress struck in ERISA between remedying past inequities as to some workers and reduction of future benefits to others

ERISA was enacted after a thorough investigation and study of problems in the pension plan area. Congress considered the extent to which it should provide retroactive relief to persons who had failed to meet harsh eligibility requirements in the past. It was mindful, however, that correction of such inequities would involve charges to be borne by the funds, and therefore had to be balanced against the inequity of defeating the legitimate pension expectations of other workers. The compromises incorporated in ERISA now threaten to be vitiated by Rule 10b-5 suits which in effect seek the very retroactive relief that Congress determined should not be granted.

The balancing of competing equities which Congress fashioned is illustrated by the exceptions Congress provided to the general rule that *all* service with the participating employer, whether before or after the enactment of ERISA, must be credited for vesting purposes. For example, service prior to January 1, 1970, need not be counted unless an employee has at least three years of service after December 31, 1970.[15] A plan may also disregard service before the effective date of ERISA if such service would otherwise have been disregarded under the rules of the plan with regard to breaks in service.[16]

These exceptions were deliberately enacted "[t]o keep the operation of the minimum vesting requirement reasonable and to avoid imposing undue burdens

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[15] ERISA § 203(b)(1)(E); I.R.C. § 411(a)(4)(E). The cited provisions do not permit disregard of service which the pre-ERISA plan terms required be counted.

[16] ERISA § 203(b)(1)(F); I.R.C. § 411(a)(4)(F).

on plans . . . ."[17] With respect to workers such as Mr. Daniel, Congress' determination to balance the competing interests involved is set forth in unmistakable terms:

> "[I]t does not appear to be desirable to provide for retroactive vesting for employees who have already terminated their service with the employer, since this would create a substantial unexpected cost for the plan (thereby possibly jeopardizing the size of benefits for employees still covered under the plan). . . ."[18]

Allowing private suits under Rule 10b-5 would thus upset the balance which Congress so carefully struck in ERISA. Furthermore, that balance in ERISA proceeds from Congress' understanding that the securities laws were inapplicable (*see* Teamsters International Petition at 33-41), an understanding which is now "part of the arch on which the new structure rests," *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 349 (1963). This is another sound policy reason why the Court should reject the lower court's extension of private rights of action under Rule 10b-5.

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[17] House Ways and Means Committee Report on H.R. 12855, H.R. Rep. No. 93-807, 93d Cong., 2d Sess. 20 (1974). *See also* House Ways and Means Committee Report on H.R. 12481, H.R. Rep. No. 93-779, 93d Cong., 2d Sess. 20 (1974); 120 Cong. Rec. 4297 (1974) (remarks of Mr. Ullman).

[18] House Ways and Means Committee Report on H.R. 12481, H. Rep. No. 93-779, 93d Cong. 2d Sess. 56 (1974); House Ways and Means Committee Report on H.R. 12855, H.R. Rep. No. 93-807, 93d Rep. No. 93-779, 93d Cong. 2d Sess. 56 (1974); House Ways and Cong., 2d Sess. 57 (1974). *See also* 120 Cong. Rec. 19199 (1974) (remarks of Mr. Ullman).

c. Extension of such private rights of action would require disclosure inconsistent with the type of disclosure which Congress, in passing ERISA, deemed appropriate.

The ERISA disclosure requirements[19] are a direct response to testimony by one worker after another that he had been unaware of the provisions and rules. Even when plan documents and explanatory materials had been provided, they were generally incomprehensible to plan participants. As one worker testified,

> "You see, all of these pensions are done up by corporation lawyers and against people, say working people with a high school education, and as everybody knows, there's no competition."[20]

Another worker said,

> "Senator, I have here books on the pension plan that ain't worth a quarter because I can't understand it. I don't know anything about it, and I defy any trustee of our plan to explain this to me. . . ."[21]

Congress therefore required that the document summarizing and describing the plan "be written in a manner calculated to be understood by the average

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[19] ERISA sections 101 through 110 and 1031 through 1034 detail the disclosure and reporting required of pension plans. In some cases, this disclosure takes place directly to plan participants, in other cases, to the Department of Labor or the Treasury Department. For the most part, however, those reports made to government agencies rather than plan participants are themselves public information. ERISA § 106(a). Lengthy disclosure and reporting regulations have been promulgated by the Labor Department. *See* 29 C.F.R. §§ 2520.102-1 *et seq.* and §§ 2520.103-1 *et seq.*

[20] *See* 120 Cong. Rec. 29934 (1974) (remarks of Sen. Williams).

[21] *See id.*

plan participant. . . ." ERISA section 102(a)(1). It would require an amazing feat of draftsmanship, however, to make disclosures which would comply with ERISA section 102(a)(1) and yet suffice to avoid Rule 10b-5 liability. As corporate counsel are well aware, assurance against liability under Rule 10b-5 requires disclosure of all information which might reasonably be deemed "material" in light of this Court's opinion in *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438, 449 (1976).[22] This is the type of disclosure, however, that workers complained about,[23] and that Congress determined to prevent in ERISA.

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[22] There are no definitive guidelines in the antifraud area of the securities laws. Rule 10b-5 itself is written in broad, general terms. The SEC has not utilized rulemaking power to clarify its requirements, *cf. SEC* v. *Chenery Corp.*, 332 U.S. 194, 215 (1947) (Jackson, J., dissenting) (Holding Company Act), but has instead relied on case-by-case adjudication, where courts have interpreted the requirements of the rule "flexibly," *e.g., Lanza* v. *Drexel & Co.*, 479 F.2d 1277, 1299 (2d Cir. 1973), "broadly," *e.g., Garner* v. *Pearson*, 374 F. Supp. 591, 595 (M.D. Fla. 1974), and "liberally," *e.g., Fox* v. *Kane-Miller Corp.*, 398 F. Supp. 609, 637 (D. Md. 1975), *aff'd*, 542 F.2d 915 (4th Cir. 1976). The establishment of definitive guidelines is contrary to the policy of the SEC. In responding to a request from Senators Williams and Javits as to what disclosure the SEC believed is required of pension plans under the lower court's decision, the Chairman of the SEC responded, *inter alia*, "[T]he efficacy of the antifraud provisions would be sacrificed if hard and fast rules were laid down as to what those provisions required. . . ." Memorandum submitted under cover letter of December 7, 1977 to Honorable Harrison A. Williams, Chairman, Committee on Human Resources, United States Senate, by Harold M. Williams, Chairman, SEC.

[23] Even the more sophisticated investor in the traditional securities markets may find such disclosure too complex or lengthy to understand. However, there are analysts and investment counselors to whom such documents are understandable and meaningful. One who purchases securities on a broker's recommendation or on the advice of an investment analyst or newspaper columnist may well have benefitted from such disclosure. There are no parties analogous to analysts and investment counselors in the pension plan context.

C. The Decision Below Particularly Jeopardizes The Benefits Of Workers Covered By Multiemployer Plans

The potential for liability (including retroactive liability) under the lower court's decision and the additional layer of administrative regulation it imposes are likely not only to cause a reduction of benefits in some plans but may also cause some employers to withdraw altogether from pension plans in which they participate. As previously noted (p. 6-7), the complexity of regulation and the increased costs imposed on pension plans by ERISA have already caused a large number of plans to terminate.

The NCCMP fears that the adverse affects of the holding below will be especially significant in multiemployer plans because the plan termination and contingent employer liability provisions of ERISA presently allow employers contributing to multiemployer plans to withdraw from participation more easily than those contributing to single employer plans. An employer's withdrawal from a single-employer plan normally results in plan termination, imposing substantial ERISA-related liability on the employer. In contrast, an employer's withdrawal from a multiemployer plan, (by "bargaining out"—*i.e.*, not agreeing in the next collective bargaining agreement to continue contributions to the plan) will generally not cause a plan termination,[24] and the employer may well escape all lia-

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[24] In most cases, ERISA does not even require such withdrawal to be reported. When a "substantial employer" (an employer accounting for 10% or more of the plan's contributions over two consecutive years out of the three years preceding withdrawal (ERISA § 4001(a)(2)) withdraws from a plan, the plan administrator must notify the PBGC. ERISA § 4063(a)(1). (It is not yet clear whether the simultaneous or concerted withdrawal of two or more employers, accounting for 10 percent or more of the plan's contributions

bility under ERISA.[25] Indeed, the termination of a multiemployer plan will generally impose no ERISA liability on contributing employers where the benefits of multiemployer plan participants are not insured under Title IV of ERISA.[26]

The ease with which employers may withdraw from multiemployer plans is of particular significance in considering the impact of extending Rule 10b-5 rights of action, given the unique role of these plans and the difficulties which have beset their creation and maintenance. Economic conditions in those industries which have multiemployer plans were generally not favorable to their formation. While unions have managed to secure the creation of such plans through collective

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only in the aggregate, constitutes the "withdrawal of a substantial employer.") The withdrawing employer must post a bond or pay an amount into escrow as surety against contingent liability in a later plan termination, but if no termination occurs in the five years following withdrawal, the withdrawing employer has no ultimate liability. ERISA § 4063(c)(2). If the withdrawal causes a "reportable event" under ERISA § 4043(b), the administrator must report such event to the PBGC, ERISA § 4043(a).

[25] A termination in the five years following withdrawal will generally impose liability, but such liability will decrease to zero over this five year period.

[26] PBGC Opinion No. 75-9 states: "Under Sec. 4082(c) of the Act, the Corporation generally does not pay benefits of multiemployer plan participants guaranteed under Title IV; and thus there is no employer liability with respect to multiemployer plans which terminate prior to January 1, 1978." ERISA allows the PBGC to provide insurance under certain conditions prior to the date where such insurance is mandatory. ERISA §§ 4082(c)(2)(3) and (4). The date such insurance becomes mandatory is presently January 1, 1978. ERISA § 4082(c). However, a bill extending this date to July 1, 1979 has been passed by Congress. *See* Pension Rep. (BNA) A-3 (Dec. 12, 1977).

bargaining, those plans have had to be carefully nurtured.[27] The plans are still attempting to adjust to the complex regulatory environment created by ERISA. The added burden of compliance with the securities laws, never contemplated, may well be too much for their fragile underpinnings. Thus, the decision below threatens the very existence of multiemployer plans—the only vehicle that exists in many industries for providing pension and welfare benefits to workers and their dependents.

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[27] A recent study by the PBGC found that "approximately one-eighth of all multiemployer plans, covering one-fifth of participants in such plans, are experiencing significant financial hardship which may result in plan termination." "Potential Multiemployer Plan Liabilities Under Title IV of ERISA," reproduced in Pens. Plan Guide (CCH) ¶ 23,036 (1977).

CONCLUSION

For the foregoing reasons, the NCCMP urges that the Court grant the petitions for writ of certiorari.

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